DOCKET FILE COPY ORIGINAL

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
TELEPHONE (202)424-7500
FACSIMILE (202) 424-7643

PHILIP J. MACRES
ATTORNEY
DIRECT DIAL (202) 424-7770
PJMACRES@SWIDLAW.COM

NEW YORK OFFICE
405 LEXINGTON AVENUE
NEW YORK, NY 10174

April 30, 2001

VIA COURIER

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
TW A325
Washington, D.C. 20554

Re: CC Docket Nos. 98-141 & 98-184

Dear Ms. Salas:

Enclosed for filing in the above-referenced proceedings pursuant to the Commission's March 30, 2001 Public Notice, DA 01-722, requesting comments are an original and four paper copies of the Comments of Allegiance Telecom, Inc. and RCN Telecom Services, Inc.

Please date stamp and return the enclosed extra copy of this filing in the self-addressed, postage prepaid envelope provided. Should you have any questions concerning this filing, please do not hesitate to call us.

Respectfully submitted,

Philip J. Macres

Enclosures

cc: Morton Posner, Allegiance Telecom, Inc
Joseph Kahl, RCN Telecom Services, Inc.
Eric Branfman
Michael Shor

No. of Copies rec'd 0+4
List A B C D E

375535.1

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of	)	
	)	
AMERITECH CORP., Transferor, And	)	
SBC COMMUNICATIONS INC.,	)	CC Docket No. 98-141
Transferee,	)	
For Consent to Transfer Control.	)	
	)	
	)	
	)	
GTE CORPORATION, Transferor, And	)	
BELL ATLANTIC CORPORATION,	)	CC Docket No. 98-184
Transferee,	)	
For Consent to Transfer Control.	)	

COMMENTS OF ALLEGIANCE TELECOM, INC. AND RCN TELECOM SERVICES, INC. RESPONDING TO MFN MERGER CONDITION CLARIFICATION REQUESTS

Eric J. Branfman
Michael L. Shor
Philip J. Macres
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007

Counsel for Allegiance Telecom, Inc. and
RCN Telecom Services, Inc.

April 30, 2001

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY

Allegiance Telecom, Inc. ("Allegiance") and RCN Telecom Services, Inc. ("RCN") request that the Common Carrier Bureau ("CCB") act expeditiously to reject Verizon's Communications, Inc. ("Verizon's") request that the Bell Atlantic/GTE most-favored-nation ("MFN") MFN merger condition (the "BA/GTE Merger Condition") be clarified to exclude negotiated 251(b) provisions including negotiated reciprocal compensation arrangements for ISP-bound traffic. The BA/GTE Merger Condition expressly requires Verizon to permit competitive local exchange carriers ("CLECs") to import entire pre-merger negotiated agreements, or portions of those agreements, into other Bell Atlantic and GTE states. Verizon's requested clarification, if adopted, would defeat the pro-competitive objectives of this condition which, along with other conditions, was imposed to justify merger approval. In addition, Joint Commenters request, for similar reasons, that the CCB expeditiously modify the SBC/Ameritech MFN merger conditions ("SBC Merger Condition") to match the corollary conditions in the BA/GTE Merger Conditions to provide unequivocally that SBC negotiated arrangements are importable across SBC states.

The Commission needs to set consideration of Verizon's request in the proper context. At bottom, Verizon's unilateral approach to implementing the BA/GTE Merger Condition and its request to the Commission to "clarify" that Merger Condition is nothing more than Verizon's way of yet-again gaming the system to disadvantage competing carriers and to impede the development of competition. It should come as no surprise to the Commission that the provisions of the voluntarily negotiated agreements which Verizon has carved out of the cross-border adoption process are the provisions which, as it turns out, were most favorable to the competing carriers. It also should come as no surprise that the replacement provisions which Verizon has tried to impose upon competing carriers are decidedly more favorable to Verizon.

To borrow from a famous anthem of the 1960's: the Commission "doesn't need a weatherman to know which way the wind is blowing."

The first consequence of Verizon's approach is that Verizon is able to attempt to force CLECs to agree to language far less favorable to them than that agreed to by Verizon and the original CLEC. The second consequence has been delay -- unreasonable, unconscionable, delay. The BA/GTE Merger Condition was approved on June 16, 2000. Since that time, there have been innumerable requests from CLECs to import entire negotiated agreements across borders into legacy territories. In the months that have passed since the BA/GTE Merger Condition was approved, it is fair to say that not a single entire agreement containing services and arrangements under section 251(b) of the Act successfully has been adopted across state borders. The impact on the spread and development of competition is readily apparent: Unable to benefit from the BA/GTE Merger Condition and easily adopt available agreements across borders, and faced with the prospect of lengthy and expensive negotiations and arbitrations in many states, the expansion plans of competing carriers, which were predicated on the ease of market entry provided by the adoption process provided by the BA/GTE Merger Condition have simply ground to a halt.

It is against this backdrop that the Commission is asked to "clarify" the meaning of a perfectly clear order. Allegiance and RCN respectfully submit that the answer is obvious: no clarification is necessary, only enforcement. The Commission should therefore direct Verizon and SBC to implement their respective merger conditions as originally intended.

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of	)	
	)	
AMERITECH CORP., Transferor, And	)	
SBC COMMUNICATIONS INC.,	)	CC Docket No. 98-141
Transferee,	)	
For Consent to Transfer Control.	)	
	)	
	)	
GTE CORPORATION, Transferor, And	)	
BELL ATLANTIC CORPORATION,	)	CC Docket No. 98-184
Transferee,	)	
For Consent to Transfer Control.	)	

COMMENTS OF ALLEGIANCE TELECOM, INC. AND RCN TELECOM SERVICES, INC. RESPONDING TO MFN MERGER CONDITION CLARIFICATION REQUESTS

Allegiance Telecom, Inc. ("Allegiance") and RCN Telecom Services, Inc. ("RCN") ("Joint Commenters") hereby respectfully submit comments in response to the Common Carrier Bureau's ("CCB") request for comment on letters filed by Verizon Communications, Inc. ("Verizon") and Birch Telecom, Inc. ("Birch") regarding most-favored-nation ("MFN") merger condition of the Bell Atlantic/GTE[1] and SBC/Ameritech[2] merger orders in the above-captioned proceedings.[3]

---

[1] *GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 98-184, Memorandum Opinion and Order, 15 FCC Rcd 14032, Appendix D at ¶ 32 (rel. June 16, 2000) ("*Bell Atlantic/GTE Merger Order*").

[2] *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5,22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, CC Docket 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712, App. C at ¶ 43 (1999) ("*SBC/Ameritech Merger Order*").

[3] *See Common Carrier Bureau Seeks Comment on Letters Filed By Verizon and Birch Regarding Most-Favored Nation Condition of SBC/Ameritech and Bell Atlantic/GTE Orders*, CC Docket Nos. 98-141, 98-184, Public Notice, DA 01-722 (March 30, 2001 Public Notice).

STATEMENT OF FACTS

Lest the Commission erroneously conclude that this issue was raised for the first time in Verizon's February 20, 2001 letter, or that, as framed by Verizon, it deals only with the very narrow issue of reciprocal compensation for ISP-bound traffic, a short summary of the underlying facts is essential.

Following approval of the Bell Atlantic/GTE merger, several competitive local exchange carriers—Focal Communications Corporation ("Focal") and Global NAPs, Inc. ("GNAPs"), among others—sought to exercise their rights under the BA/GTE Merger Condition to import an entire negotiated interconnection agreement between Bell Atlantic-Vermont and Global NAPs (the "GNAPs Agreement") into Virginia, Delaware, Massachusetts and the District of Columbia. Verizon opposed Focal's request in part, arguing that under its interpretation of the BA/GTE Merger Condition, it was not obligated to import those provisions of the GNAPs Agreement which arose under section 251(b) of the Act.[4] In short, Verizon was prepared to permit Focal to transport only portions of the approved GNAPs Agreement across borders, but other key provisions of those agreements, were to be carved out. Verizon did not address how Focal could operate without those provisions grounded in section 251(b); presumably, Verizon expected Focal, and other CLECs to negotiate and/or arbitrate those arrangements.

Thereafter, and by letter dated November 9, 2000, Focal asked the CCB to clarify that the language of the BA/GTE Merger Condition permitting a requesting carrier to import an entire negotiated interconnection agreement, which includes arrangements falling under 47 U.S.C. § 251(b) and (c), means what it says: that entire agreements are importable into other legacy Bell

---

[4] Ultimately, Verizon advised Focal that it would not permit reciprocal compensation arrangements, access to rights-of-way, dialing parity and number portability arrangements to be imported into another legacy territory.

Atlantic and GTE states pursuant to the *Bell Atlantic/GTE Merger Order* and the associated BA/GTE Merger Condition.[5] Verizon responded, arguing its interpretation of the BA/GTE Merger Condition, which is that only those interconnection arrangements, UNE's or provisions which are subject to section 251(c) of the Act can be taken across borders.[6] Verizon discounted the parenthetical phrase "(including an entire agreement)" as meaningless.

On December 22, 2000, the CCB issued a clarification letter[7] stating that Verizon must allow CLECs to import entire negotiated agreements, which includes 251(b) and (c) obligations, across state lines. Despite having participated fully in the clarification process, Verizon chose to ignore and to disregard the CCB's interpretation of the BA/GTE Merger Condition.

Indeed, on or about January 10, 2001, RCN Telecom Services, Inc. advised Verizon that it intended to import the entire fully negotiated interconnection agreement between Verizon South Inc., f/k/a GTE South Incorporated and Time Warner Telecom of North Carolina, L.P in North Carolina ("GTE-NC/Time Warner Agreement") into GTE's legacy territory in Pennsylvania. By letter dated January 11, 2001, and in complete disregard of the *CCB 12/22/00 Letter*, Verizon informed RCN that the entire agreement was not importable under the BA/GTE Merger Condition for the same reasons previously articulated to Focal. Instead, Verizon provided a draft adoption letter and a "Supplemental Agreement" for RCN to sign. The adoption letter reiterated Verizon's view that the provisions of the GTE-NC/Time Warner Agreement grounded in section 251(b) of the Act could not be imported. The "Supplemental Agreement"

---

[5] Letter from Michael L. Shor, Swidler Berlin Shereff Friedman, LLP to Carol Mattey, Deputy Chief, Common Carrier Bureau, FCC (Nov. 9, 2000) ("*Focal 11/9/00 Letter*").

[6] Letter from Patricia E. Koch, Assistant Vice President, Verizon Communications, Inc., to Carol E. Mattey, Deputy Chief, Common Carrier Bureau, FCC at 2 (Dec. 6, 2000).

[7] Letter from Carol E. Mattey, Deputy Chief, Common Carrier Bureau, FCC, to Michael L. Shor, Swidler Berlin Shereff Friedman, LLP, DA 00-2890, 16 FCC Rcd 22, 23 (Dec. 22, 2000) ("*CCB 12/22/00 Letter*") (emphasis added).

consisted principally of Verizon's standard template language for services and arrangements provided pursuant to Section 251(b) of the Act. Not surprisingly, the terms and conditions for the 251(b) services and arrangements in the Supplemental Agreement were decidedly *less* favorable to RCN than the corresponding provisions of the GTE-NC/Time Warner Agreement.

Similarly, on or about March 29, 2001, Allegiance informed Verizon that it, too, wanted to import the entire GTE-NC/Time Warner Agreement into Virginia. By letter dated April 12, 2001, Verizon notified Allegiance that it could not import the entire Agreement for the same reasons it had previously given to Focal and RCN. As it had done with RCN, Verizon provided to Allegiance a draft adoption letter and Supplemental Agreement to sign.[8] The Supplemental Agreement that Verizon gave to Allegiance contains fundamentally the same terms and conditions as the Agreement given to RCN. Here, too, the terms of the Supplemental Agreement are decidedly less favorable to Allegiance than the corresponding provisions of the Agreement it sought to adopt.

By letter dated February 20, 2001, Verizon asked the CCB to reconsider the *CCB 12/22/00 Letter*.[9] Verizon asked the CCB to conclude that the BA/GTE Merger Condition does not apply to voluntarily negotiated arrangements arising under section 251(b) of the Act; in particular, Verizon asked the CCB to find that it does not apply to reciprocal compensation arrangements associated with ISP-bound traffic. By letter dated March 6, 2001, Birch Telecom, Inc. filed a letter asking the bureau to interpret the relevant SBC Merger Condition as permitting it to incorporate a provision relating to reciprocal compensation from an existing negotiated

---

[8] *See* attached Exhibit A.

[9] Letter from Gordan R. Evans, Verizon Communications, Inc., to Carol E. Mattey, Chief, Common Carrier Bureau, FCC at 4 (Feb. 20, 2001) ("*Verizon's 2/20/01 Letter*").

interconnection arrangement with Sage Telecom, Inc. into current or future interconnection agreements in Oklahoma, Texas, Kansas, and Missouri.[10]

On March 30, 2001, the CCB issued a public notice requesting comment on these requests.

ARGUMENT

I. THE COMMISSION SHOULD REJECT VERIZON'S REQUEST THAT THE BA/GTE MERGER CONDITION BE "CLARIFIED" TO EXCLUDE NEGOTIATED 251(b) PROVISIONS

Verizon has asked the CCB to "clarify" that the BA/GTE Merger Condition excludes inter-carrier compensation for Internet traffic.[11] Stated differently, Verizon has requested that it be freed from the duty to allow CLECs to use the MFN provisions of the Merger Conditions with respect to all pre-merger negotiated 251(b) arrangements -- including reciprocal compensation arrangements -- that Bell Atlantic or GTE voluntarily entered into. Verizon's request is transparently hollow and should be flatly rejected because the BA/GTE Merger Condition needs no clarification. It is perfectly clear and unambiguous: it explicitly permits CLECs to adopt and import entire pre-merger negotiated agreements Bell Atlantic and GTE openly and voluntarily entered into as a result of their previous 252(a)(1) negotiations.[12] In addition, Verizon's request eviscerates the entire rationale for the merger condition. Moreover, Verizon should be estopped to make such a request given that it voluntarily entered into these conditions knowing that arbitrated or other state imposed arrangements were the only exception to the merger condition.

---

[10] Letter from John Ivanuska, Vice President, Regulatory & Carrier Relations, Birch Telecom, Inc., to Carol E. Mattey, Deputy Chief, Common Carrier Bureau, FCC (Mar. 6, 2001).

[11] *Verizon's 2/20/01 Letter* at 4.

[12] *Bell Atlantic/GTE Merger Order,* Appendix D at ¶ 32.

A. The BA/GTE Merger Condition Expressly States that an Entire Negotiated Agreement Entered into Pursuant to 252(a)(1) is Importable Across Bell Atlantic and GTE states

The CCB succinctly concluded that the BA/GTE "Merger Conditions allow competitive local exchange carriers ("CLECs") to import entire interconnection agreements across state lines.... The *plain language* of the Merger Conditions permit a CLEC to obtain an entire interconnection agreement under the MFN provisions, so long as the agreement was voluntarily negotiated and meets the timing and location requirements specified in the conditions."[13]

The BA/GTE Merger Condition sets forth the terms under which certain interconnection agreements, or provisions of those agreements, that only were available for adoption within a state under section 252(i) of the Act before the BA/GTE merger became available for broader, "in-region" adoption, after the merger.[14] Paragraph 32 states in pertinent part as follows:

> Bell Atlantic/GTE shall make available: (1) in the Bell Atlantic Service Area to any requesting telecommunications carrier ***any interconnection arrangement, UNE, or provisions of an interconnection agreement (including an entire agreement)*** subject to 47 U.S.C. § 251(c) and Paragraph 39 of these Conditions that was voluntarily negotiated by a Bell Atlantic incumbent LEC with a telecommunications carrier, pursuant to 47 U.S.C. § 252(a)(1), prior to the Merger Closing Date and (2) in the GTE Service Area to any requesting telecommunications carrier any interconnection arrangement, UNE, or provisions of an interconnection agreement subject to 47 U.S.C § 251(c) that was voluntarily negotiated by a GTE incumbent LEC with a telecommunications carrier, pursuant to 47 U.S.C. § 252(a)(1).[15]

In the *Bell Atlantic/GTE Merger Order*, the FCC further explained this aspect of the BA/GTE Merger Condition. First, the Commission clarified that the phrase "interconnection arrangement" "encompasses, both for out-of-region and in-region agreements, *entire*

---

[13] *CCB 12/22/00 Letter* at *2* (emphasis added).

[14] *Bell Atlantic/GTE Merger Order*, App. D at ¶ 32.

[15] *Bell Atlantic/GTE Merger Order*, App. D at ¶ 32 (emphasis added).

interconnection agreements or selected provisions from them."[16] Then, the Commission stated exactly what was meant by Verizon's obligations under paragraph 32 of the Merger Conditions:

> Moreover, under the conditions to this merger, *any voluntarily negotiated, in-region interconnection arrangement or UNE will be made available to requesting carriers in any other in-region service area of the particular legacy company whose interconnection arrangement or UNE is being extended.* Thus, for example, interconnection agreement provisions voluntarily negotiated by Bell Atlantic's incumbent LEC in New York prior to the merger closing date will be made available to a requesting carrier seeking to compete in the Bell Atlantic/ GTE service area in Maryland, which is a legacy Bell Atlantic service area.[17]

Because this statement is unequivocal and the Order as a whole governs the parties' rights under the enacted conditions, the CCB stated that CLECs are permitted to "obtain an entire interconnection agreement under the MFN provisions, so long as the agreement was voluntarily negotiated and meets the timing and location requirements specified in the conditions."[18] In short, Verizon's request is entirely at odds with the Commission's *Bell Atlantic/GTE Merger Order* and the adopted BA/GTE Merger Condition as interpreted by the CCB in the *CCB 12/22/00 Letter*. The CCB properly considered all of the arguments that Verizon makes here and, as such, its request for reconsideration or further "clarification" should be dismissed. The "clarification" that Verizon seeks would prevent a carrier from adopting an entire negotiated agreement[19] that includes arrangements provided pursuant to section 251(b) of the Act, including negotiated reciprocal compensation arrangements for ISP-bound traffic. This cannot be the

---

[16] *Bell Atlantic/GTE Merger Order* at ¶ 300 n.686 (emphasis added).

[17] *Bell Atlantic/GTE Merger Order* at ¶ 305 (emphasis added).

[18] *CCB 12/22/00 Letter* at 2.

[19] Section 252(a)(1) provides,

> (a) Agreements Arrived At Through Negotiations
>
> (1) Voluntary Negotiations. – Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251.

47 U.S.C. § 252(a)(1).

interpretation the Commission had in mind when it approved the BA/GTE merger.[20] Indeed, adopting Verizon's interpretation would add restraints that are not present in the BA/GTE Merger Condition itself: outside of timing and location requirements, the only clear limitations to the BA/GTE Merger Condition are arbitrated or state imposed terms and nothing else.

1. The BA/GTE Merger Condition explicitly broadens a CLEC's 252(i) rights to allow the importation of negotiated agreements into other Bell Atlantic and GTE states.

The avowed purpose of the obligations in the BA/GTE Merger Condition, as explained in the *Bell Atlantic/GTE Merger Order*, is to expand the state-specific adoption duties imposed on Verizon by section 252(i) of the Act[21] to encompass a region-wide duty.[22] In particular, the merger condition specifically provides that,

> [I]nterconnection arrangements or UNEs shall be made available to the same extent and under the same rules that would apply to a request under 47 U.S.C. § 252(i), provided that the interconnection arrangements or UNEs shall not be available beyond the last date that that they are available in the underlying agreement and that the requesting telecommunications carrier accepts all reasonably related terms and conditions as determined in part by the nature of the corresponding compromises between the parties to the underlying agreement.[23]

The CCB emphasized this point in the *CCB 12/22/00 Letter*, observing that the BA/GTE Merger Condition "expand the section 252(i) opt-in rights of CLECs by allowing CLECs to import interconnection arrangements (including entire agreements) from one state into another state,

---

[20] Verizon has yet to explain which portion of the phrase "including an entire agreement" it does not understand.

[21] Typically, an entire negotiated agreement will include all negotiated terms that are product of 252(a)(1). Section 252(i) requires incumbent LECs to:

> . . . make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier *upon the same terms and conditions* as those provided in the agreement.

[22] *See Bell Atlantic/GTE Merger Order* at ¶ 305.

[23] *Bell Atlantic/GTE Merger Order*, App. D at ¶ 32.

thereby reducing the time and expense of negotiating interconnection agreements."[24] The FCC has been clear that

> Negotiation is not required to implement a section 252(i) opt-in arrangement; indeed neither party may alter the terms of the underlying agreement ... .Otherwise, the nondiscriminatory, procompetitive purpose of section 252(i) would be defeated were requesting carriers required to undergo a lengthy negotiation ...process. [25]

Moreover, the FCC has further emphasized that "it expects incumbent carriers to make terms of a previously approved agreements available to other carriers pursuant to section 252(i) on an expedited basis."[26] It is abundantly clear that contrary to Verizon's suggestion the BA/GTE Merger Condition permits a CLEC to avoid any type of negotiation with Verizon and allows it to import pre-merger negotiated agreements throughout the legacy Bell Atlantic and GTE service areas without any types of changes.

2. Arbitrated Arrangements Associated with an Agreement and State Imposed Provisions are the only Limits to an Otherwise Entirely Importable Agreement under the Merger Conditions.

There are only two types of arrangements under the BA/GTE Merger Condition that are clearly not importable: arbitrated arrangements and state imposed provisions. Thus, the BA/GTE Merger Condition specifically provides that the MFN condition did not:

> impose any obligation on Bell Atlantic/GTE to make available to a requesting carrier any terms for interconnection arrangements or UNEs that incorporate a determination reached in an arbitration conducted in the relevant state under 47

---

[24] *CCB 12/22/00 Letter* at 3; see also *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order,* CC Docket Nos. 96-98 and 95-185, at ¶ 1321 (rel. Aug. 8, 1996) (recognizing that an essential benefit of a carrier's section 252(i) opt-in rights is the ability to avoid the burden of having to negotiate and/or to arbitrate a custom-crafted agreement over the time frame of Section 252, when existing agreements are suitable and available).

[25] *Global NAPs, Inc. Petition for Preemption of Jurisdiction of the New Jersey Board of Public Utilities Regarding Interconnection Dispute with Bell Atlantic-New Jersey, Inc.*, CC Docket No. 99-154, FCC 99-199, 14 FCC Rcd 12530 at ¶ 4 (Aug. 3, 1999) ("*GNAPs Order*") (internal quotes omitted).

[26] *Id.* at ¶ 20.

> U.S.C. § 252, or the results of negotiations with a state commission or telecommunications carrier outside of the negotiation procedures of 47 U.S.C. § 252(a)(1).[27]

Indeed, the Commission was very clear about these exceptions to the BA/GTE Merger Condition: they demonstrate the only, very limited, instances (with sound basis in policy[28]), where an agreement would not be importable. The Commission could have added other specific restrictions on the expanded 252(i) rights, but it did not do so. Verizon's refusal to permit RCN, Allegiance, and others to take advantage of the expanded 252(i) rights conveyed by the BA/GTE Merger Condition and its request to "codify" its position clearly reflects an effort to circumvent those narrow restrictions and add others that the Commission declined to add when it approved the merger.

B. Verizon's Request for Clarification Directly Contravenes the Commission's Justification for Approving the Bell Atlantic/GTE Merger.

Prior to imposing the conditions on the merger, the Commission stated that that the merger of Bell Atlantic and GTE would be detrimental to the public interest. In particular, the FCC stated,

> we find...that, absent conditions, the merger of Bell Atlantic and GTE will harm consumers of telecommunications services by (a) denying them the benefits of future probable competition between the merging firms; (b) undermining the ability of regulators and competitors to implement the pro-competitive, deregulatory framework for local telecommunications that was adopted by Congress in the1996 Act; and (c) increasing the merged entity's incentives and ability to discriminate against entrants into the local markets of the merging firms. Moreover, we also find that the asserted public interest benefits of the proposed merger will not outweigh these public interest harms.[29]

---

[27] *Bell Atlantic/GTE Merger Order*, App. D at ¶ 32.

[28] A negotiated agreement reflects a voluntary meeting of the minds by both parties; in an arbitrated context, however, a state commission may impose arrangements on one or both parties and, in that context, it would not necessarily be reasonable to permit an entity that was not a party to the arbitration to benefit from the results of the arbitration because it was not voluntary.

[29] *Bell Atlantic/GTE Merger Order* at ¶ 3.

The Commission believed, however, that the merger conditions voluntarily proposed and assumed by Bell Atlantic and GTE would alter the public interest balance. The Commission acknowledged that absent supplemental conditions, "the proposed merger does not serve the public interest, convenience, or necessity because it would inevitably slow progress in opening local telecommunications markets to consumer-benefiting competition."[30] Seeking a way to circumvent the merger conditions, Verizon wants to avoid the market opening objectives that were used to gain approval of the merger through a request that negotiated 251(b) arrangements be exempted from the BA/GTE Merger Condition -- allegedly as a matter of broad policy.

Contrary to Verizon's assertions, the overarching policy of the BA/GTE Merger Condition is as sound now as it was when approved and the purpose of that Condition should not be defeated or diluted by Verizon's request to "clarify" a perfectly clear provision. This is especially true when the request is based on a narrow, self-serving interpretation of the BA/GTE Merger Condition—that it only applies to Verizon's 251(c) obligations and not its 251(b) obligations as well—that benefits only Verizon. Beyond the sound policy basis mitigating against the requested clarification, Verizon should be estopped from pursuing such a request in the first place. Verizon voluntarily agreed to the subject Merger Condition with full knowledge of the meaning given to it by the Commission and a full understanding of the narrow limitations that were placed on the expanded 252(i) adoption rights. Either Verizon understood those limits and accepted them at the time or, alternatively, Verizon never had any intention of complying with the BA/GTE Merger Condition. In either case, the time for expressing its opinion and requesting "clarification" was before the merger was approved, not long after the fact.

[30] *Bell Atlantic/GTE Merger Order* at ¶ 96.

1. The policy justifying the BA/GTE Merger Condition is irrefutably sound; it permits CLECs to import, among other things, all negotiated 251(b) provisions.

Verizon's request for clarification that section 251(b) arrangements are not included within the ambit of the BA/GTE Merger Condition rests solely on its belief that it is only obligated under the BA/GTE Merger Condition to make available to CLECs those provisions of interconnection agreements which are subject to section 251(c) of the Act.[31] This tortured interpretation, however, ignores the express language of the *Bell Atlantic/GTE Merger Order* and the associated BA/GTE Merger Condition as interpreted by the CCB in the *CCB 12/22/00 Letter*. As noted, the plain language of the BA/GTE Merger Condition specifically allows CLECs to adopt an "entire agreement."

Moreover, Verizon's claim that the "sole issue in dispute between the parties" and the only contract provision at issue is the "single provision that addressed compensation for internet traffic" is simply untrue; the dispute goes far beyond this one issue and encompasses the full panoply of 251(b) arrangements.[32] In fact, the sole justification of Verizon's request for clarification implicates all the other arrangements under section 251(b) that impose resale, number portability, dialing parity, and access to rights-of-way, as well as reciprocal compensation duties on carriers. These duties are an integral part of nearly every interconnection agreement. Accordingly, if these provisions are *not* importable under the BA/GTE Merger Condition, a CLEC exercising its rights under the BA/GTE Merger Condition to adopt a negotiated agreement across state borders would not get an entire agreement as the

[31] *Verizon 2/20/01 Letter* at 3.

[32] *Verizon 2/20/01 Letter* at 1-2.

BA/GTE Merger Condition contemplated; instead, the CLEC would get a mere skeleton missing critical components.

As the CCB recognized, Verizon's distorted interpretation of the BA/GTE Merger Condition is unsupported by the Act. By its terms, section 251(c) -- which sets forth additional obligations that apply only to incumbent LECs -- incorporates explicitly and unequivocally the obligations and duties of section 251(b). In particular, section 251(c) specifically states that,

> ***[I]n addition to*** the duties contained in subsection (b), each incumbent exchange carrier has the following duties:
>
> (1) DUTY TO NEGOTIATE. – The ***duty to negotiate in good faith*** in accordance with section 252 ***the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection***.[33]

In short, section 251(c) does not stand alone, as Verizon argues. Instead, it is inextricably linked to, and incorporates by express reference, all of the duties of section 251(b) that Verizon contends are excluded from its obligations under the BA/GTE Merger Condition. The two subsections are joined in the Act and they were similarly joined in the BA/GTE Merger Condition. Verizon's efforts to uncouple its 251(b) obligations from those set forth in 251(c) must be rejected.

Verizon also claims that "broader policy implications" support its clarification request due to the issues relating to reciprocal compensation for ISP-bound traffic. On the contrary, the overarching policy goal of the BA/GTE Merger Condition is to "mitigate the harms of the merger by facilitating market entry and spreading the use of best practices throughout Verizon's

[33] 47 U.S.C. § 251(c) (emphasis added).

region."[34] It was designed to establish a level playing field for CLECs to enter into Bell Atlantic and GTE territories easily, without negotiations and without any impediments as a result of the monopoly power the merged Bell Atlantic and GTE entities leverage on a state-by-state basis. Clearly, the BA/GTE Merger Condition would be rendered meaningless if CLECs were forced to negotiate separately to obtain the 251(b) arrangements that were present in the original agreement, but could not be imported across state borders.[35]

2. Verizon's requested clarification will impede rather than promote competition, as the BA/GTE Merger Condition was originally designed to do, because CLECs will be unable to quickly and easily enter into an Agreement.

The inherent and dismal consequences associated with adopting Verizon's request are that CLECs who exercise their rights under the BA/GTE Merger Condition will be required to negotiate separate agreements with Verizon to cover 251(b) resale, number portability, dialing parity, access to rights of way and reciprocal compensation arrangements. Indeed, since the merger was approved, Verizon has required CLECs who choose to exercise their rights under the BA/GTE Merger Condition to enter into a "Supplemental Agreement" (a copy is attached as Exhibit A) -- a 23 page document which covers these provisions. Without fail, the provisions in this Supplemental Agreement are far more favorable to Verizon and, as matters now stand, a CLEC cannot obtain the services and arrangements it needs without pursuing costly, time-consuming negotiations and arbitrations over provisions that Verizon has carved out of the original agreement the CLEC sought to adopt.

---

[34] *See CCB 12/22/00 Letter* at 2 (citing *Bell Atlantic/GTE Merger Order* at paras. 300-05, 352 (stating that the MFN provisions reduce a CLEC's risk and cost of entry), 256 (stating that the MFN provisions will spread the use of best practices), 370 (noting that the MFN provisions will lower entry barriers for CLECs)).

[35] *See CCB 12/22/00 Letter* at 2-3.

As a result, if the Commission adopts Verizon's position, CLECs will not be able to adopt an entire agreement within the former legacy territories with the ease contemplated by the BA/GTE Merger Condition. Indeed, the purpose of the BA/GTE Merger Condition would be defeated if the Commission adopts Verizon's interpretation. Furthermore, such an outcome would prove as well-founded the Commission's fears that the merger would inevitably slow progress in opening local telecommunications markets to consumer-benefiting competition.[36]

3. A CLEC's ability to adopt negotiated reciprocal compensation arrangements for ISP-bound traffic under the BA/GTE Merger Condition was not preempted by previous FCC decisions.

Verizon claims that the FCC's vacated and remanded decisions regarding the issue of reciprocal compensation for ISP-bound traffic somehow prevent a carrier from importing voluntarily negotiated reciprocal compensation arrangements for all traffic under the BA/GTE Merger Condition.[37] This assertion is simply wrong. In fact, the Commission's Declaratory Ruling in CC Docket 99-68 specifically provided that in the absence of a federal rule, "parties may voluntarily include this traffic within the scope of their interconnection agreements under sections 251 and 252 of the Act," even if it turns out that these statutory provisions do not apply as a matter of law.[38] The Commission further stated that "[w]here parties have agreed to include this traffic within their section 251 and 252 interconnection agreements, they are bound by those agreements, as interpreted and enforced by the state commissions."[39]

---

[36] *Bell Atlantic/GTE Merger Order* at ¶ 96.

[37] *Verizon 2/22/01 Letter* at 3.

[38] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 3689, at ¶22 (1999) ("*2/26/99 Reciprocal Compensation Order*").

[39] *2/26/99 Reciprocal Compensation Order* at ¶ 22.

Verizon's argument misses the point. The interconnection agreements that it voluntarily entered into before the merger either speak to the issue or are silent. If the issue is addressed specifically, then the agreement should be performed, interpreted and/or enforced in accordance with its terms. Indeed, the presence or absence a specific provision dealing with reciprocal compensation for ISP traffic should not impact whether a different CLEC can adopt that negotiated agreement in another state under the BA/GTE Merger Condition. In fact, the BA/GTE Merger Condition speaks to this point precisely.

Moreover, Joint Commenters position is consistent with the Commission's recent ruling on inter-carrier compensation for ISP-bound traffic[40] and Joint Commenters expect that Verizon's intransigence will not prevent them from exercising their rights under the BA/GTE Merger Condition as a result of this order. Although the *4/27/01 Reciprocal Compensation Order* states that CLECs will not be able to exercise their section 252(i) rights to opt into any terms and conditions regarding inter-carrier compensation for ISP-bound traffic subsequent to the publication of the Order in the Federal Register, that does not impact legitimate requests to adopt negotiated agreements that were given to Verizon long before that date. Otherwise, the Commission would reward Verizon's refusal to enter into entire agreements prior to the publication of the *4/27/01 Reciprocal Compensation Order* in the Federal Register.[41] Clearly, "but for" Verizon's intransigence, Joint Commenters—and others—would already have had agreements in place with terms addressing ISP-bound traffic. Indeed, the Commission should

[40] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, FCC 01-131, at ¶ 82 (rel. Apr. 27, 2001) ("*4/27/01 Reciprocal Compensation Order*").

[41] *2/27/01 Reciprocal Compensation Order* at ¶ 82.

acknowledge that adoption requests submitted prior to the publication of *4/27/01Reciprocal Compensation Order* in the Federal Register are grandfathered under that Order.[42]

C. Verizon Should be Estopped to Assert that Negotiated Reciprocal Compensation Arrangements do Not Apply Under the BA/GTE Merger Condition.

During the merger review process, Bell Atlantic and GTE touted that the proposed conditions would allow interconnecting carriers in a BA or GTE states to adopt terms from agreements negotiated prior to the merger in any other BA or GTE state.[43] Beyond comments on other issues not relevant here, Bell Atlantic's and GTE's primary focus during the merger review process was that the BA/GTE Merger Condition did not apply to arbitrated arrangements.[44] That was it; nothing more. Notably, neither Bell Atlantic nor GTE stated the limited view of the BA/GTE Merger Condition that the merged entity Verizon articulates here. Quite the contrary: Bell Atlantic and GTE firmly stated that negotiated agreements would be importable under the conditions. In fact, Bell Atlantic and GTE, on their own, modified the proposed condition to include the notion that the MFN provision for pre-merger agreements applied to "entire agreements" just to ensure proper interpretation of the conditions.[45] If Verizon had a specific meaning of the term "entire agreement" in mind at the time it modified the BA/GTE Merger Condition to include the phrase, then that was the time to tell the world what it

---

[42] Joint Commenters reserve the right to address the interplay between recently issued *4/27/01 Reciprocal Compensation Order* and the BA/GTE Merger Condition in Reply Comments.

[43] *See* Application of GTE Corporation and Bell Atlantic Corporation for Transfer of Control (filed Oct. 2, 1998) (Bell Atlantic/GTE Oct. 2, 1998 Application); Supplemental Filing of Bell Atlantic and GTE at 26 (filed Jan. 27, 2000) (Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing).

[44] Response of Bell Atlantic and GTE in Support of their Submissions, CC Docket No. 98-184, at 7 (filed May 9, 2000); Reply of Bell Atlantic and GTE in Support of their Supplemental Filing, CC Docket No. 98-184, at 15-16, App. C 23-24 (filed March 16, 2000).

[45] Letter from Pat Koch, Bell Atlantic, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 98-184, ¶ 32 (filed May 19, 2000) (Bell Atlantic/GTE May 19, 2000 *Ex Parte* Letter).

meant. Verizon did not do so and, therefore, it should be estopped from now trying to limit the term to something less than its plain meaning.

II. THE FCC SHOULD MODIFY THE SBC MERGER CONDITION TO MATCH THE COROLLARY BA/GTE MFN MERGER CONDITION.

Consistent with interpretation of the BA/GTE Merger Condition requested here, the FCC should also modify the SBC Merger Condition so that it tracks the obligations of the BA/GTE Merger Condition.[46] As it currently stands under the *SBC/Ameritech Merger Order*, SBC/Ameritech is required to make available to any requesting telecommunications carrier in any of its 13 states any interconnection arrangement or UNE in any other of the same 13 states that was negotiated by an affiliate of SBC subject to state-specific pricing.[47] Similar to the BA/GTE Merger Condition, the SBC Merger Condition states that "interconnection arrangements or UNEs shall be made available to the same extent and under the same rules that would apply to a request under 47 U.S.C. § 252(i)."[48]

In short, the relationship between BA/GTE Merger Condition, section 252(i), and the overall policy to mitigate the harms of the merger by facilitating CLEC market entry and use of best practices throughout Verizon's region is identical to the relationship that exists under the SBC Merger Condition as it applies in SBC/Ameritech's territory. Therefore, the Commission should clarify that it is SBC's obligation to allow CLECs to import all SBC negotiated interconnection arrangements entered into pursuant to 252(a)(1), without limitation to 251(b) or (c) duties into other SBC states.

---

[46] *SBC/Ameritech Merger Order*, App. C at ¶ 43.

[47] *SBC/Ameritech Merger Order* at ¶ 388.

[48] *SBC/Ameritech Merger Order*, App. C at ¶ 43.

III. THE FCC SHOULD RENDER AN EXPEDITED RULING SO THAT CLECS MAY PROPERLY BENEFIT FROM THE MFN CONDITIONS AS ORIGINALLY CONTEMPLATED.

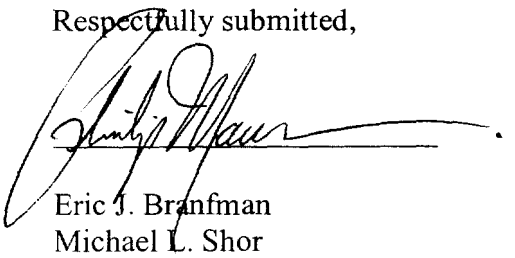
Joint Commenters urge the Commission to render decisions as requested above on an expedited basis. This is necessary so that carriers may exercise their rights under the respective MFN merger conditions and receive the full benefits and selection of agreements that were originally contemplated by them. Tellingly, Verizon and SBC have been able to obstruct rather than facilitate market entry throughout their respective regions by interpreting their respective merger conditions in an unmeritorious manner.

Perhaps more tellingly, it is clear that both Verizon and SBC will use this regulatory proceeding to shield them from the intended meaning of the MFN merger conditions, and will continue their unconscionable conduct and interpretations of the conditions pending a Commission decision on these matters. Moreover, during this timeframe, the pool of qualifying premerger agreements, which were originally contemplated under the merger conditions, shrinks with every passing day because the agreements are terminating on an ongoing basis and are not importable beyond their respective termination dates. For instance, the GTE-NC/Time Warner Agreement that Allegiance and RCN seek to import expires on May 11, 2002. If the Commission delays in rendering a decision in this proceeding, the agreement may expire or may not be importable when a Commission determination is finally made. As a result, Verizon accomplishes its ultimate objective -- which is to prevent CLECs from importing this specific agreement into other GTE states. Therefore, to minimize the harm created by Verizon's and SBC's actions and the consequences associated with a delayed decision, the Joint Commenters strongly urge the Commission to expeditiously render a decision as requested above.

CONCLUSION

For the foregoing reasons, the Commission expeditiously should reject Verizon's request for clarification of the BA/GTE Merger Condition and confirm that, subject only to the express limits in the Merger Condition, a requesting carrier can adopt an entire negotiated agreement across borders. The Commission should also clarify that the SBC Merger Condition be interpreted in a similar manner.

Respectfully submitted,



Eric J. Branfman
Michael L. Shor
Philip J. Macres
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W.,
Suite 300
Washington, DC 20007

Counsel for Allegiance Telecom, Inc. and
RCN Telecom Services, Inc.

April 30, 2001